

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 959 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KOLI RAVAJIBHAI MADHUBHAI

Appearance:

Ms.HARSHA DEVANI, A.P.P. for the appellant.

MR MJ BUDDHBHATTI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE D.P.BUCH

Date of decision: 14/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The acquittal of the respondent of the offences punishable under section 376 read with sections 511 & 323 of the Indian Penal Code recorded by the learned Sessions Judge, Surendranagar vide judgment dated August 1, 1985, in Sessions Case No. 17/85, is subject matter of challenge in the present appeal, which is filed under section 378 of the Code of Criminal Procedure.

2. Complainant Labhuben Kalabhai is a resident of Kolivas, near Ambaji Temple, Muli. The incident in question took place on January 8, 1985. On that day at about 8.00 A.M. in the morning the complainant in company of her cousin sister Naniben Sukhabhai had gone to cut and collect fire wood near Dam situated at the outskirts of the village and reached the place where fire wood was to be cut at about 9.00 A.M. When the complainant and her sister were cutting fire wood, the respondent who is also a resident of village Muli, came near complainant Labhuben at about 11.00 A.M. and tried to rape her. However, the respondent did not succeed in his evil design because Labhuben had crossed her legs. According to the prosecution, the respondent had warned Labhuben not to raise shouts, but her sister Naniben had raised shouts and told the respondent that she was calling her uncle, as a result of which the accused had run away. The prosecution case further is that after this incident, both the sisters had again started cutting and collecting fire wood and prepared bundles of fire wood to be carried home and when they were near the gate of Dam, again the respondent had thrown down the bundle of fire wood, which was on the head of Naniben and attempted to commit rape on Naniben. On attempt to rape being committed, complainant Labhuben had raised shouts and informed Surubha, who was busy with agricultural operations in his field. Thereupon, Surubha had accompanied Labhuben with crowbar and on hearing voice of Surubha and Labhuben, the respondent had run away. After the incident, Labhuben and her sister had returned home and on insistence of Surubha, Labhuben filed complaint against the respondent with Muli Police Station, Muli. The complaint filed by Labhuben was investigated by Sahadevsinh Bahadursinh, P.S.I. of Muli Police Station. At the conclusion of investigation, the respondent was chargesheeted for the offences punishable under section 376 read with section 511 and 323 of the Indian Penal Code. As the offence punishable under section 376 I.P.C. is exclusively triable by the Court of Sessions, the case was committed to Sessions Court, Surendranagar for trial, where it was registered as Sessions Case No. 17/85. The learned Judge framed charge at Exh.3 against the respondent for the offence punishable under section 376

read with sections 511 & 323 of the Indian Penal Code. The charge was read over and explained to the respondent, who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution had examined; (1) Dr. Ramnikbhai Kalabhai Chavda as P.W. 1 at Exh.6, who had issued injury certificate pertaining to Naniben; (2) complainant Labhuben Gandabhai as P.W. 2 at Exh.8, (3) Naniben Sukhabhai as P.W. 3 at Exh.10, (4) Jayendrasinh Hemantsinh Jhala as P.W. 4 at Exh.11, (5) Bhikhubha Jilubha as P.W. 5 at Exh.14, (6) Narubha Jivubha as P.W. 6 at Exh.16, (7) Vasudev Manishanker as P.W.7 at Exh.19, (8) Surubha Jethubha as P.W.8 at Exh.22, and investigating officer, P.S.I. Sahdevsinh Bahadursinh as P.W.9 at Exh.23 as well as produced documentary evidence to prove its case against the respondent. After recording of evidence of prosecution witnesses was over, statement of the respondent was recorded under section 313 of the Code of Criminal Procedure. In his statement, the respondent denied the case of the prosecution, but did not examine any witness in support of his defence. On appreciation of evidence, the learned Sessions Judge concluded that the case against the respondent was not proved. In that view of the conclusion, the learned Judge has acquitted the respondent vide judgment dated August 1, 1985, giving rise to the present appeal.

3. Ms. Harsha Devani, learned counsel for the State submitted that though both the victim girls had turned hostile to the prosecution, they had supported the prosecution case in cross-examination by the learned Public Prosecutor and, therefore, the respondent ought to have been convicted of the offences with which he was charged. The learned counsel pleaded that the evidence given by witness Naniben during the course of her cross-examination by the learned Public Prosecutor, is corroborated by medical evidence on record and, therefore, the appeal should be accepted. The learned counsel emphasized that because of some understanding between the father of the respondent and the two girls, two girls refused to identify the respondent before the Court, but as the substratum of the prosecution case stands proved during the cross-examination of two girls, the respondent should be convicted of the offences punishable under section 376 read with sections 511 & 323 of the Indian Penal Code.

4. Mr. Jiten Budhbhatti, learned counsel for the respondent submitted that when the two girl witnesses with whom the respondent is alleged to have made attempt to commit rape, have not supported the prosecution, the appeal should be dismissed. According to the learned

counsel for the respondent, the girls maintained before the Court that one who had attempted to commit rape had muffed his face and as identity of the accused itself is in doubt, the acquittal of the respondent should not be reversed, more particularly when the evidence of two girls has not inspired confidence of the learned Sessions Judge, who had opportunity to observe demeanour of the witnesses. The learned counsel lastly submitted that even if two views are possible, decision rendered by the learned Sessions Judge should not be disturbed in the present acquittal appeal.

5. We have heard the learned counsel for the parties and taken into consideration the evidence on record. We are distressed to state that though Labhuben had filed complaint for attempt to commit rape on herself as well as on Naniben, neither Labhuben nor Naniben has supported the case against the respondent before the Court. Labhuben in her examination-in-chief has clearly stated that the man who had attempted to commit rape on her had muffed his face and the respondent was not the person who had attempted to commit rape. Though she claimed before the Court that the F.I.R. was reduced into writing as per her instructions, in the next breath she stated that no incident as mentioned in the complaint had taken place. As she had not supported the prosecution case, she was treated as a hostile witness and was subjected to cross-examination by the learned Public Prosecutor. Even during her cross-examination by the learned Public Prosecutor she maintained that wrong facts were stated in her F.I.R. and during the cross-examination by the defence, she admitted in terms that the name of the respondent was mentioned in her complaint as accused because one woman had met her on her way to home and had informed that the unknown person who had attempted to commit rape, was resembling the respondent. Again, Naniben Subhabhai, P.W. 3 in her examination-in-chief clearly stated that the man who had tried to commit rape on her had muffed his face and she was not able to identify him. She was treated as a hostile witness and was cross-examined by the learned Public Prosecutor. During the course of her cross-examination by the learned Public Prosecutor, she stated that as the father of the respondent had entreated her and Labhuben to pardon his son, they had decided to depose before the Court to the effect that the person who had attempted to commit rape had muffed his face, but in her cross-examination by the learned counsel for the defence, she in terms admitted that she had not been able to identify the person who had made attempt to commit rape on her and had not known the respondent nor had met the father of the respondent. She

further stated in her cross-examination by the learned counsel for the defence that in fact the complaint was not lodged by Labhuben, but was got dictated by Surjibha, who had accompanied Labhuben and her at the Police Station. Except the two girls, the prosecution has not been able to examine any witness in support of its charge against the respondent that he had attempted to commit rape on the two girls. The evidence of Labhuben and Naniben would indicate that at the time when the attempt to commit rape on Labhuben was made, Naniben was present and when attempt to commit rape on Naniben was made, Labhuben was present. Normally, in presence of another girl, the respondent would not make an attempt to commit rape and if the incident as alleged by Labhuben had taken place at 11.00 A.M., both the sisters would have returned home immediately and would not have continued to cut and collect fire wood thereafter. On overall view of the matter, we are satisfied that the learned Sessions Judge has not committed any error in appreciating the evidence led by the prosecution. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the Trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in (1) *Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhary*, A.I.R. 1967 S.C. 1124, and (2) *State of Karnataka v. Hema Reddy and others*, A.I.R. 1981 S.C. 1417. Although in an appeal from an order of acquittal, the powers of the High Court as appellate Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, the appellate Court should always give proper weight and consideration to such matters as (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt; and (iv) the slowness of an appellate Court in disturbing a finding of

fact arrived at by a Judge, who had the advantage of observing demeanour of the witnesses. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. The appeal, therefore, cannot be accepted and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed.

(J.M.Panchal,J.)

(D.P. Buch, J.)
(patel)